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THE BASIS OF AFFIRMATIVE OBLIGATIONS IN THE LAW OF TORT.

To constitute actionable negligence there must concur three essential elements—a duty of care, a breach of that duty by negligent act or omission, and injury naturally resulting therefrom. The principles controlling the existence of the two latter have been formulated with some approach to exactness, the difficulty in regard thereto being as to their application to the particular facts of each case. It is surprising to find that every attempt to announce either judicially or in text-books any inclusive affirmative principle of the origin of the duty of care, the primary fundamental requisite, has been unsuccessful.

In strictness, negligence is to be regarded as but one of the ways in which a legal duty could be violated and a wrongful injury caused.¹ Negligent acts and negligent omission are met in all branches of the law—tort, contract, crimes. The conception of negligence as a distinctive wrong, the violation of a duty to act with average prudence,

¹ This is pointed out by Mr. Beven in the introduction to his masterly treatise on the subject.

is quite modern. Originally certain acts, if done at all, were attended as a legal consequence by liability in a fixed amount for any injury caused thereby, the amount varying according to the character of the injury and the social condition of the party injured, and sometimes according to the nature of the act. When for definite fines and the later appeals for murder and kindred writs were substituted the writ of trespass, the gist of the wrong still remained largely criminal. The writ was given in the King's court only because the King's peace was violated. The direct forcible nature of the violation rather than the amount of injury done, the private right violated, was the important thing. As trespass lost its semi-criminal aspect and became more and more a mode of obtaining private compensation, force in the sense of violent breach of the King's peace disappeared as a necessary element, it being only required that a private right had been directly violated. The view-point of the law was still very external, it was the act—the invasion of the right—that was important, not the motive or intent which prompted it, nor was it even important that the violator had been morally or socially innocent. Innocence of intention, propriety of conduct, was no excuse if an act was done directly invading a legal right. Such an act was in law a trespass, unless there existed such compulsion by superior irresistible force as to render the defendant rather the instrument than the actor.²

A further form of *vis major* came gradually to be recognized, the force of circumstances beyond the defendant's control. After *Weaver v. Ward*³ the idea was current, if not indisputable, that a direct violation of a right could be excused by showing that it was unintentional and wholly without the actor's fault. Negligence, as that term is now understood, comes into play as an answer to this excuse. If due care be not taken, the injury has not occurred wholly without the actor's fault. The failure to take due care is such a fault as destroys the possibility of such excuse.

² See Pollock on Torts, 160 to 175. Also for origin of the writ of trespass, Pollock and Maitland's History of the Common Law.

³ Hob. 134 (A.D. 1616)

The law at this stage may be stated thus: An act directly injurious was *prima facie* actionable, as excuse could be urged that the defendant had intended no violation of the plaintiff's rights, and had taken all reasonable precautions to prevent their invasion. As actions on the case were allowed to redress acts indirectly injurious, the same conceptions naturally extended to them. It is not surprising, therefore, to find that in the case⁴ in which occurs Baron Alderson's famous definition of negligence, the question presented was whether the injury was excused by precautions adequate under any expectable state of affairs, and that it has been customary to find the principles of liability for negligence stated restrictively and negatively rather than inclusively and affirmatively. It is comparatively easy to state restrictively the test to determine where no duty of care arises towards others; there can be no duty to act unless injury can be foreseen as likely to occur to some person or property if the act be not done, or to refrain from any act unless it threatens probable injury thereto. Brett, M. R. (afterwards Lord Esher), has in *Heaven v. Pender*⁵ attempted to lay down an affirmative general rule as follows: "Whenever one person is placed by circumstances in such a position in regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such injury." However, the majority of the Court of Appeal, Cotton, L. J., Bowen, L. J., concurring, after citing many cases which negatived the existence of so wide a rule, decided the case on narrower grounds. And Brett, M. R., himself in *Le Lievre v. Gould*⁶ limits it as follows:

"If one man is near another or his property, a duty lies on him not to do that which may cause a personal injury to that other or may injure his property." Now it is

⁴ *Blythe v. Birmingham Water-Works*, 11 Ex. 784.

⁵ L. R. 11, Q. B. D. 503.

⁶ L. R. 93, 1 Q. B. D. 49.

noticeable that the instances which he gives of the application of this rule are cases presenting these following striking features. There is negligent action, an active negligent misfeasance, and, secondly, those to whom the duty is owed are either persons strangers to the defendant who forces himself into contact with them without their consent, often without their knowledge, or they are persons who in the exercise of their own legal rights are brought within reach of his conduct.

On the other hand, it will be found that in the cases upon which the majority of the court proceeded in *Heaven v. Pender*, and, indeed, in all cases before and since which deny the universal application of Brett, M. R.'s, rule, there is to be found these elements: 1st. The negligence complained of is a failure to take affirmative precaution—a non feasance of a duty of care. 2d. The plaintiff has voluntarily placed himself within reach of the effects of the defendant's failure to take precautions. Often there exists a contract to which the plaintiff is not privy, requiring this very precaution to be taken. These cases usually deal with the obligations of the owners, possessors, and users of real and personal property, and those supplying information as the basis of others' actions, and those carrying on business.

Is the rule in *Heaven v. Pender*, as limited to negligent acts, active misfeasance, a correct statement of the law, and is the existence of the other affirmative duties based on any broad general principles, or are there merely a number of fixed relations to which by custom or precedent have attached such duties for reasons peculiar to themselves? If the latter, the courts of to-day have but slight aid from the past in ascertaining the existence of such a duty in any of those new relations, those novel combinations of circumstances which the marvellous growth of modern science and business is constantly creating.

While, as Mr. Justice Holmes says,⁷ "Ancient examples (of tort liability) are traced to rude conceptions which have given way in modern times to more or less definitely

⁷ VII Harv. R. 552.

thought-out views of public policy," none the less the transition has been gradual. Many of our present principles of public policy were early developed, or are at least legitimate extensions of early conceptions, and even the most modern views have been affected by the settled rules which had their roots in early practices now perhaps obsolete. To the common-law lawyer it was a much simpler thing to mould and modify a pre-existing practice to meet some new exigency of civilization than to build up a new set of principles. It is inevitable that the duties which public policy imposes on various relations shall be ascertained not only by a balance struck between the value to the public of the right to be protected and the loss sustained by the burden imposed upon the energies of him on whom the duty is laid, but also by a regard for, and deference to, long established precedents and usages.

It has been seen that the primary conception of a tortious act was an act done directly injurious to another's rights. Most, if not all, injuries were inflicted by strangers having no connection with the injured party, those who either sought out the injured party or those with whom he was of necessity thrown into contact in the exercise of his legal rights. The same principle which made an invasion of another's property, however unwitting, a trespass, which held a man to a knowledge at his peril of his legal rights, of what was his own, naturally held him to an assumption of all risks attendant upon the use of another's property, unless he could show that his use was in the exercise of some legal right. If, then, one chose to use the property or services of another, it is natural to find that in the early stages of legal development he must show that such other had assumed some obligation towards him before he could complain that such property was defective or the services improperly performed or unperformed.

On the whole, it may be said that an active injurious misfeasance was actionable,⁸ and that lack of intent was no

⁸ Unless excused by the fact that the act was in furtherance of some purpose in the accomplishment of which the public was so far inter-

defence if injury could have been avoided by care. No distinction could be properly made between direct and indirect injuries; nor between acts not intentional but the result of neglect, and acts which while intentional were not injurious if properly done, but which were injurious because improperly done. And as a further step, even acts neither intended to harm nor carelessly performed were by analogy held wrongful, if because of a carelessness in preparation they were injurious. All of these are, however, but a natural extension of the idea of active misfeasance. But where there was no active misfeasance of any kind, but only a failure to take affirmative precautions to protect others from injury no wise attributable to any *act* of the defendant, quite a different question was presented. No analogy existed to trespass nor nuisance. Care was the price of action. The early law was rather a police officer than a child's nurse or guardian for the incompetent. While no man was allowed to *act* so as to injure others, the early law recognized no general duty of protection. This was quite a different thing; a conception appropriate to a highly organized civilization. As yet everyone was regarded as able to protect himself, as responsible for his own safety, the law merely saw that he was not interfered with from without. He must take his own precautions, take upon himself the risks of what he may choose to do. Therefore, a mere failure to protect another from a threatened injury,⁹ whether an intentional or negligent omission, was not actionable unless some obligation had been intentionally assumed.

The assumption of a duty was originally a necessary element in all cases where the plaintiff had voluntarily placed himself in relation to the defendant, and so within reach of the effect of his actions even when the injury was caused by misfeasance. Certain it is that the earliest cases in which the word *assumpsit* occurs in the declaration are those of

ested that it required it to be done even at the cost of the injury to private rights. This public policy may be reformulated by the courts, or expressed in a statute authorizing the doing of the act.

⁹ Willes, J., in *Gautret v. Egerton*: "No action will lie against a spiteful man who seeing another running into a position of danger merely omits to warn him."

active misfeasance in the performance either of a quasi public occupation¹⁰ or of work assumed to be done for a reward. Almost at once the line is drawn between mere non-feasance and an actual misfeasance—a failure to confer the benefit promised and an act causing some actual detriment, some real loss. In both for a time the assumpsit is alleged; soon in the latter class of case it need not be proved nor can it be traversed.¹¹ In the former a consideration is necessary to support the obligation, at first and for some time a consideration paid at the time of the assumption,¹² in the latter the work, having been assumed, if done at all, must be done in such a way as not to injure the plaintiff, and this is so, even though the assumption be gratuitous, if the injury be one other than a failure to obtain the benefit to be derived from a perfect performance. If such were the only injury sustained, either an intentional or negligent omission or act resulting in an improper or inadequate performance could only be reached by an action directly on the assumpsit itself.

Here, then, is the point of separation of tort and contract as they at present exist, and though the latter has been greatly developed and extended, here to-day is the line which fundamentally separates them.¹³ The public has an interest that no man shall act so as to injure another, it has no concern that he shall benefit anyone. At first a mere failure to receive a benefit expected from the performance of a promise, not being a formal covenant, was no legal damage, it was no loss of anything already possessed or to which there was a legal right: the legal right to such benefit¹⁴ had

¹⁰ Year Book, 22 Ass. 94, pl. 41. See "The History of Assumpsit," by James Barr Ames, vol. ii, Harv. Law Rev. 1.

¹¹ In Rolle, Ab. 10, page 5, where a farrier had injured a horse in shoeing it, the assumpsit is held not traversable, the negligent injury being the gist of the action.

¹² Else no injury done, no loss as consequence of relying on the promise. For a long time the point which most concerns the courts is whether a mere liability to pay upon the performance of the work is a good consideration. This may arise by usage or by the terms of the promise.

¹³ Despite the encroachment of contract upon the original domain of tort.

¹⁴ Save where the promise was under seal and so in legal effect a grant. See Y. B. 21 Henry VI, pl. 12: "If a carpenter make a bargain

still to be worked out through many long and tiresome steps.¹⁵ As an action on the case on the assumpsit, in which damage was essential, was the medium chosen for this development, it was necessary to find some actual loss, some minus quantity, and not a mere absence of a plus. To do so, it was at first necessary to show a consideration paid on the faith of the promise, the loss of which was, of course, legal damage. In time the mere giving of a promise for a promise came to be regarded as a good consideration—by so promising the party had placed himself under a *prima facie* obligation,¹⁶ at least it lay within the other's power to make it binding by performing his part. Here then was a detriment, a change of position for the worse on the faith of the promise and so damage. For a long time it is this which is discussed, must the consideration be actually paid at the time of the promise? is it enough that it will be payable upon its performance?¹⁷ From this necessity of proving actual damage it followed that no one but he who has furnished the consideration could have a writ of trespass on the case in assumpsit where the breach was the nonperformance of a beneficial promise. From this purely procedural rule, applicable only to the form of action, has sprung the doctrine that no obligation can arise out of a contract save towards one who is party to the consideration. Now it had been held before a mere giving of a promise was considered a good consideration that where there was an active mis-

or covenant with me to make a house sufficient and good containing such a quantity in length and before a certain day, if he makes me no house I shall not have against him a writ of trespass on the case but an action of covenant if the covenant be written, but if he build it contrary to the contract, although the contract was not written, I shall have against him writ of trespass on the case." Misfeasance and nonfeasance are quite different things: "So, if a smith make a covenant to shoe my horse and he shoes him and wounds him with a nail, I shall have an action on the case, but if he does not do anything to the horse, I shall have no action" (on the case). Then they argue that an action will lie against a surgeon, who, having agreed to cure an arm or head, fails to do so, Ascue arguing that a writ of trespass lies for a failure to attend and give his medicines whereby the arm or head is injured. Contra, it was argued that it could lie only for giving the wrong medicines. These instances constantly recur in the Year Books.

¹⁵ See the most valuable article by James Barr Ames, Esq., in ii Harvard Law Review.

¹⁶ Ibid.

¹⁷ See "History of Assumpsit," ii Harvard Law Review.

feasance by the promisor, the promisee, although he had as yet parted with nothing, could recover for an injury sustained.¹⁸ So an action on the case lay whenever an injury was actually sustained by a misperformance, not a mere benefit withheld.¹⁹

¹⁸ See "History of Assumpsit," also Y. B. 20 Henry VI 30, pl. 4. The evil conduct of the defendant, his breach of faith, seems the gist of this action of deceit. It would appear also that there was a covenant in writing to convey certain land for one hundred pounds to be paid, and the defendant enfeoffed another and so deceived the plaintiff. It is urged that covenant and not deceit was the proper remedy. But it was held that here was an evil thing done, a misfeasance and no mere non-feasance. Then, too, it would appear that there was an injury apart from the mere failure to obtain the land, for the land might still be conveyed, the defendant might repurchase it, but what he had done would still be injurious. The position of the plaintiff would even then be altered for the worse. There being a covenant, there was a grant to which the plaintiff had a legal right, the value of which the defendant has injured. Now this case has been applied and followed even where the promise was by parol, and the consideration a promise to pay, and has been extended to cases where the default was a wrong only in that it was a failure to perform, and so a fraud upon the plaintiff's just expectations. An interesting instance given shows how strictly a covenant was construed and the entire absence of warranty by implication, the letter of the bond and no more being given. "If a carpenter takes on himself to build me a house of such a size this he does, but he makes an error in joining or some such way, now action of covenant fails because he has kept all of his covenants, and yet I shall have action on the case because he has done badly.

¹⁹ In Y. B. 3 Henry VI 36, 33 the customary example is given by Babington—*i.e.*, "Where one makes a covenant with me to cover my hall by a certain time within which time he does not do so, so that in default of covering the woodwork is drenched by the rain, I shall have a writ of trespass on the case." Now, while this is cited constantly as an example of an admitted liability, the injury is hardly one resulting from a misperformance, but is rather a failure to obtain the benefit of a proper performance. While the roof is bad, it is better than none; the injury results because the roof was not put up in time. Perhaps if the actual case had arisen, the justices of those days, astute as they were to seize upon any technical decision, would have so found. Since such actions were brought in case on the assumpsit, they have in modern times been taken to sound in contract, though in their origin they are pure torts; acts positively injurious, and so wrongful. Now, a covenant to build a house or do an act was, as has been seen, satisfied by the bare performance of the act itself, nor was it usual to specify with any particularity the detail. So the obligation was founded not upon any direct promise contained in the covenant to do good work, but upon the obligation of a craftsman working at his craft for hire to do competent work. This not resting upon any agreement in the covenant between the parties, and so not being a grant personal to the covenantee, was not a duty to him only but to all who might be affected by such bad work. When simple contracts took the place of the covenants, and were redressable only by actions on the case in assumpsit, where in such case there was a positive injury and not a mere failure

As before stated, when there was an active misfeasance—an act in itself injurious the assumpsit, while still alleged, soon became no longer material and was not traversable. When, however, there was alleged an affirmative duty to act in some way to protect others, quite a different question was presented. Affirmative action could only be required when it was assumed or imposed as a duty; such duties were only assumed or imposed for a consideration, a benefit conferred, as their price. So in Y. B. 3 Henry VI 36, pl. 33, Babington says: "If I bring deceit against one for this that he was my attorney and by his negligence and default I lost my land, in this case it is necessary that I declare how he was retained by me and took his fee."

And in Y. B. 19 Henry VI 49, pl. 5, Newton says: "It seems this is a good plea, for it may be he assumed to cure your horse in Oxford, which he has done, and that in London your horse had the infirmity again and that he of his good will applied his medicines and then your horse died. Now for this that he did of his own good will you should have no action. It follows he shall not have an action unless the defendant took on himself (assumpsit) the cure." Paston, "You have not shown he was a common farrier to cure horses—in which case if he kill your horse by his medicines you shall not have an action against him without assumption."²⁰ To the exercise of certain businesses, trades, and professions was attached the duty of care therein; one of these is here indicated—farriers; others were carriers, innkeepers, barbers, surgeons, and physicians—all callings ex-

to profit by a partial performance of the promise, all persons injured could have an action, not the promisee alone. But, where the promisee did sue, since a consideration must be alleged to prove that the work was not gratuitous, and since such consideration was usually furnished by the promisee, the obligation and the right came to be regarded as contractual, wholly created by the promise made upon good consideration. In this way, a great deal of confusion has arisen. Elements of damage and many other matters applicable only to torts have been in such cases imported into the law of contracts.

²⁰ Rolle's Ab. 10, pl. 5, where a farmer had injured a horse in shoeing it, the assumpsit was held not traversable, the negligent injury being the gist of the action.

ercised on the public for the profit of those who practised them. Some of them, such as carriers, innkeepers, and the like, exercised callings of a quasi public nature, which to-day are often termed public utilities, in the performance of which the public had an interest that they should be performed, not merely that if performed they should be performed properly,—these were bound to accept all who came as clients or customers, since they could not refuse, a mere offer to deal with them completed the assumpsit and no assumpsit need be alleged save such a tender of the plaintiff or his property to be acted upon. In all, the proper performance of their duties affected not merely those who might be the actual persons making such tenders and paying the price, but others also; any neglect might threaten not merely the loss of benefit of a proper exercise of their calling, but actual loss. So it was soon held that as to them the assumpsit need not be alleged and that those who engaged therein assumed a duty to exercise them properly²¹ to all those who might be affected thereby, irrespective of who made the contract or paid the price. So the true owner of goods could recover for the loss of them in the hands of a carrier, though another paid for the carriage. An innkeeper was liable to the owner of money stolen from his servant while the latter was a guest,²² an owner of a horse could recover for an injury done by a farrier though the servant paid him for the shoeing,²³ and a patient for an injury done by a doctor's carelessness though another paid the fees.

Here, however, it is well to notice that while the consideration moved from one other than the plaintiff, still the assumption of responsibility did in fact rest on a consideration. Because the carrier or innkeeper is entitled to pay as carrier or innkeeper, he is bound to answer for the safety of goods entrusted to his care and must bear the

²¹ "It is the duty of every artificer to exercise his art rightly and truly as he ought." Fitzherbert's *Natura Brevium*, 94 D. (1514 A.D.), cited by Williams, J. *Marshall v. York and Newcastle Ry.*, 11 C. B. 563.

²² *Beedle v. Morris, innkeeper of Dunchurch*, Cro. Jac. 224.

²³ *Everard v. Hopkins*, 2 Bulst. 332.

burden with the benefit.²⁴ The two go hand in hand. If, on the contrary, he had assumed expressly a duty outside of his position as innkeeper, only he to whom he had assumed it could sue. This would be upon the special assumpsit, the private obligation, not on that imposed by law upon him as the price of engaging in these gainful pursuits. The action lay for the misperformance of these latter duties, not, it is true, if the assumption of the task was gratuitous, but if it were in the exercise of the calling and so for gain. Nor did it matter from whom the consideration moved. That it was for gain was enough, and that the person injured would naturally be affected by its malperformance.

This, then, is the original conception of a duty to take precaution to insure the safety of others who have voluntarily come into contact with the obligor. It was an incident of the assumption of a business carried on for gain, a business of a sort which if not carefully carried on is dangerous to those on whom it is exercised. So firmly was this idea of misconduct of a business fixed in the early law, that only the master farrier was responsible for injury to a horse badly shod, and not the apprentice, who alone had touched it.

It is submitted that while everyone is bound to refrain from action, probably injurious to others, no duty to take affirmative precautions for the protection of those voluntarily placing themselves in contact with him is cast upon anyone save as the price of some benefit to him.²⁵ The duty is in fact founded on a consideration moving to the obligor, though not necessarily from the obligee. These conceptions plainly appear in and control the English cases dealing with the obligations of owners and occupiers of real estate. These naturally were originally the most important; in these the rights and obligations became first definitely for-

²⁴ See *Gelly v. Clerk*, Cro, Jac. 188.

²⁵ Originally, perhaps, such others as did not voluntarily come within the radius of his action.

Such duties may also be directly imposed by statute and a duty of affirmative action is imposed as the price of the assumption of public office. See Day, J., in *Gilbert v. Trinity House*, L. R. 17 Q. B. D. 795.

mulated. In these, owing to the conservative attitude of courts towards all matters touching real property, does the modern law correspond most truly to the earliest legal conceptions. The obligations of an owner or occupier of real estate fall into two distinct classes: 1st, towards those who, in the exercise of their own rights independent of and in no way derived through the owner or occupier, are forced into contact with the land, such as owners and occupiers of adjacent property and travellers on adjacent highways; 2d, towards those whose right, if any, is derived through him or who without such right intrude thereon. The owner of real property might do what he pleased in the enjoyment of his property—perhaps no higher form of privilege is known to the law than that of an owner to devote his land to what uses he sees fit²⁶—so long as he confined the effects of his user to his own land. No other had legal rights thereon,²⁷ but he was bound to confine these effects to his land. If these effects were external and injurious to the enjoyment of the legal rights of neighboring owners or those legally using an adjacent highway, he became at once liable to them. He was not merely bound to refrain from injurious misfeasance, he was liable for mere non feasance of certain positive duties cast on him by his position.²⁸ However, in all of these cases the positive duty was one arising out of some particular use of the property, a duty to protect from the consequences naturally to be expected from a particular act done unless care was taken. No duty existed to prevent the spread of fire unless the fire was started by the owner or as incident to the use of his property, no duty of care arose out of ownership alone.²⁹ While in certain respects the rigor of the old law has been

²⁶ See Mr. Justice Holmes, *vii Harvard Law Review*, 4.

²⁷ Where others had legal rights they must be respected, and the owner's privilege was by so much abridged.

²⁸ For one thing, to keep fire from spreading, *Tuberville v. Stampe*, 1 Ld. Raymond, 264, to confine cattle, etc.

²⁹ *Giles v. Walker*, L. R. 24, Q. B. D. 656. An owner is not bound to alter the natural condition of land though injurious to his neighbor. *Crowhurst v. Burial Board*, L. R. 4 Exchequer Div. 5. But if he does alter it, he is bound to take care that no injury result. See Beven, page 353.

abated, certain onerous positive duties have been remitted in the growing recognition of the public value of the owner's privilege of freedom in the development of his property, the distinction between defects whose injurious consequences extend beyond the boundaries of the property, generally termed *nuisances*, and those which do not, is as marked to-day as it ever was.

No duty arose out of mere passive ownership. To-day it is still true that no duty to take affirmative steps to protect others can arise save from a use of property by the owner for his purposes. If for his purpose he erected a structure, he would be bound to maintain it in repair so that it should not injure those adjacent. Nor could then, any more than now, any man so act upon his land or use his land in such a way as to cause injury to his neighbors. He was not bound to act at all, but if he did, he must act carefully. Such, outlined in the briefest forms, are the obligations of an occupier of real property to his neighbors, those who in the exercise of their legal rights are forced into contact with the land. But where persons voluntarily³⁰ come on the premises with or without the invitation or consent of the owner, the case is quite different. They need not come unless they wish. The occupier cannot be liable for any condition of his premises which is made known to his visitor. They have no right to come there irrespective of the occupier's consent. A danger, knowledge of which interferes with their coming, is not in derogation of any legal right. Even a shopkeeper may keep his shop in a ruinous condition, provided such condition be palpable, if he wishes to handicap himself by thus driving away customers. A traveller on an abutting highway or an adjacent landowner has a legal right thereon, and the occupier cannot abridge or interfere with such rights by making their enjoyment dangerous. It may be that if the danger be imminent, voluntarily to encounter it may be contributory negligence and may bar a recovery, but it does not destroy the wrongful character of the occupier's conduct,

³⁰ This excepts such cases as *Barnes v. Ward*, 9 C. B. 392, where an unintentional misstep brings a passer-by into contact with the danger.

and an act done in assertion of one's legal rights, unless the danger be very imminent, would not be called voluntary nor contributory negligence.³¹ The English cases where the plaintiff comes on the premises not in the exercise of any independent legal right of his own fall into three distinct classes: 1st. Where the plaintiff is a trespasser. 2d. Where he comes on the land with the consent, or even at the invitation, of the occupiers, but upon his own concerns. 3d. Where he comes upon the land at the invitation, express or implied, of the occupier for the purposes of the occupier and in the course of his beneficial use of the land.

1st. Towards trespassers, there is held to be no duty either to fit the premises for their safe use nor even to give warning of concealed dangers.³² The trespasser must take the land as he finds it and the owner can only be liable for an intentional act of commission, as the setting of spring guns or other traps.³³

2d. The position of a bare licensee is somewhat better. The owner's permission makes his presence lawful, and also expectable. It gives him a right to be on the premises, but no right to have the premises made safe for him. The permission to use the premises being wholly for the interest of the licensee, and without shadow of consideration moving to the licensor, is a gift, and "A giver is not liable for the insecurity of the thing, unless he knew of its evil character and omitted to warn the donee. Some wrongful *act* must be shown or some breach of a positive duty. Every man is bound not wilfully to deceive others nor do any act which may place them in danger."³⁴ In *Southcote v. Stanley*,³⁵ a declaration alleging that the plaintiff, a *visitor*, lawfully on the premises of the defendant, an innkeeper, was injured by reason of the defective condition of a glass door therein, was held bad on demurrer, the plaintiff alleging nothing more than a bare license, Alderson, B., saying: "The case

³¹ See *Clayards v. Dethick*, 12 A. B. 439.

³² Known to such occupier.

³³ *Bird v. Holbrook*, 4 Bing. 628.

³⁴ Willis, J., in *Gautret v. Egerton*, L. R. 3, C. O. 371.

³⁵ 1 H. and N. 247. Not cited in *Heaven v. Pender*.

of a shop is different. There is a difference between persons who come on business and those who come by invitation.”³⁶

In *Gautret v. Egerton*³⁷ it was held that no duty existed towards a bare licensee to take care to keep property in safe repair for his use, Willes, J., saying: “The permission to use the defendant’s bridges, etc., was general to all persons, not those only who went upon the defendant’s business to his docks.” It was not alleged that the plaintiff was using the bridge because he had business with the defendant at his dock; nor was there any allegation “of any wrong-doing such as digging a ditch or misrepresenting its condition or anything equivalent to laying a trap for the unwary. . . . I cannot conceive that he can incur any responsibility by reason of the premises being out of repair.” So in *Ivay v. Hedges*³⁸ it was held that there was no obligation to repair or fence a roof upon which tenants were permitted to dry their linen. Lord Coleridge distinguished the Scotch case of *McMartin v. Hanway*,³⁹ where a tenement was let out in flats, all the tenants using a common staircase, because “the staircase was therefore a necessary part of the holding, and it was the landlord’s duty to keep it in a state in which it could be safely used.”

In *Corby v. Hill*⁴⁰ the defendant was a contractor who

³⁶ It must be remembered that this case came before the court on demurrer, and was decided on the sufficiency of the declaration. It therefore is only authority against the right of a bare licensee to recover. Had the declaration alleged that the plaintiff had come upon the premises for any purpose for which the Inn was held open to the public, even though not as a directly paying guest, as when he called to see a friend by appointment, the declaration would probably have been held good (see *Axtell v. Prior*, 14 W. R. 601, where a jury’s finding that the plaintiff was a guest and so entitled to recover for injuries caused by an unfenced hole in the parlor floor was held justified by the fact that he was waiting in the tap-room for his friend), a different question would have been presented.

Said Willes, J., in *Indamaur v. Dames*: “Alderson, B., drew the distinction between a bare licensee and a person coming on business, and Bramwell, B., between active negligence in respect to unusual danger known to the host and not to the guest and a bare defect of construction which the host was only negligent in not finding out or anticipating the consequence of.”

³⁷ L. R. 3, C. P. 271.

³⁸ L. R. 11, Q. B. D. 80, not cited in *Heaven v. Pender*.

³⁹ 10 Ct. of Sess. Cases, 411, 3d Series.

⁴⁰ 4 C. B. N. S. 566.

had been permitted by the owner of the premises to place a pile of slates in a driveway upon which persons, such as the plaintiff, having occasion to go to the premises, had leave to use. He did so without giving any warning of their presence, and the plaintiff on a dark night was injured. It was held he might recover,⁴¹ Willes, J., saying: "The question is whether there is any legal remedy for a person lawfully using a road to whom injury results from the act of a third person in negligently⁴² placing an obstruction upon the road. One who comes on the land by the owner's permission or invitation has a right to expect that the owner will not dig a pit therein or permit another to dig a pit thereon⁴³ so that persons lawfully coming there may be injured." The form of declaration which he then said he would have drawn would be like this, "the defendant knowing that the plaintiff was by license of the owner accustomed and likely to pass along the road, wrongfully and negligently placed slates in such a manner as to be likely to prove dangerous to persons coming along the road." This falls within the latter part of the rule announced by Willes, J., in *Gautret v. Egerton*: "Every man is bound not wilfully to deceive another nor *do any act* which may place them in danger." He goes on, "It may be that, as in *Corby v. Hill*, he is responsible if he put an obstruction on a way which is likely to cause injury to those who by his permission use it, but I cannot conceive that he can incur any responsibility merely by reason of the premises being out of repair." Here the distinction is sharply drawn between acts of negligent commission and a mere omission, a failure to repair carefully. As he says, there must be a wrongful *act* or a breach of a positive duty. In *Corby v. Hill* there was a negligent act, in *Gautret v. Egerton* the mere permission to use did not raise a positive duty to repair. In both *Ivay v. Hedges* and *Southcote v.*

⁴¹ Irrespective of the construction of the owner's permission as giving the contractor the right to obstruct the road without notice, although the court believed the owner's license could not be so construed.

⁴² Without due warning.

⁴³ Or create any other unexpected danger, as in the case under discussion.

Stanley, supra, the default alleged was but a negligent omission to repair, or take some other affirmative precaution. Baron Bramwell in the latter case laid emphasis upon this: "If," he said, "a person asked another to walk in his garden where he had placed spring guns, this would be an act of commission. But if a person asked another to sleep in his house and omitted to see that the sheets were properly aired, he would have no action, for there was no act of commission, but simply an act of omission. The declaration merely alleges that by and through the mere carelessness and negligence of the defendants the door fell; this means a want of care, a failure to do something."

*Humphrey v. Gallagher*⁴⁴ deals with another and kindred phase of an occupier's duties, his duty to conduct himself and his affairs upon his land with due regard to the rights of those who are lawfully thereon with his permission. The plaintiff was a boy carrying dinner to his father, a workman of defendant. To do so he was allowed to go through the defendant's premises. While there the defendant's servants by the careless handling of a crane used in their business caused a barrel of sugar to fall on him. Cockburn, C. J., said: "The defendants permitted the way to be used by persons having legitimate business⁴⁵ upon the premises. By such permission they place themselves under the obligation of *not doing* anything by himself or his servants from which injury may arise." The existence of any positive duty to put the premises in safe condition for the licensee's use is expressly repudiated. This case follows closely the suggested declaration in *Corby v. Hill* and supports Brett, M. R.'s, proposition as applicable to the duty of refraining from injurious actions. Limitations thereto may and probably do exist inherent in the privilege of an owner of land to use it for what purposes he may see fit, which allows him the utmost freedom of action thereon.⁴⁶

⁴⁴ 6 L. T. R. N. S. 684. 10 W. R. 664 (1862).

⁴⁵ Of their own evidently, not of the owners.

⁴⁶ Subject to this, that the owner or anyone else upon the land must avoid acts probably injurious to persons who may be expected to be lawfully upon the land. His obligation to expectable trespassers is a somewhat different and more difficult question.

3d. If the plaintiff be not a bare licensee, but one coming to the premises for a purpose in which the owner has an interest, he has the right to be protected from running into dangers known to the owner, or which should be discovered by him, and not expectable by the visitor.

In *Indamaur v. Dames*,⁴⁷ on the authority of which the majority of the court preceded in *Heaven v. Pender*, it was held that a gasfitter going to a sugar refinery to inspect a patent gas regulator, being upon the premises upon business which concerns the occupier, is entitled to expect that the occupier "shall use reasonable care to prevent injury from unusual danger which he knows or ought to know." And where he fell into an unfenced shaft there was evidence of neglect, and it was a question for jury whether reasonable care had been taken, by notice, lighting, guarding, or otherwise. This case is accepted as the leading case upon the subject. Earlier cases had formulated the same principle. In *Lancaster Canal Co. v. Parnaby*,⁴⁸ in 1839, it was held that since the company had made the canal for their profit, and opened it upon payment of tolls to the company, the common law imposed on them a duty to take reasonable care so long as they keep it open for the use of all who choose to navigate it, that "they may navigate it without danger to their lives and property . . . upon a similar principle to that which makes a shopowner liable for neglect in leaving a trap door open by which his customer suffers injury," and in *Chapman v. Rothwell*⁴⁹ Erle, J., said, "The distinction is between the case of a visitor, who must take care of himself, and a customer, who as one of the public is invited *for the purpose of the business carried on by the defendant*." This principle, says Willes, J., in *Indamaur v. Dames*, "does not depend on the fact of a contract entered into in the way of the customer's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, *with a view to business which concerns*

⁴⁷ L. R. 1, C. P. 274, affirmed on appeal L. R. 2, C. P. 311.

⁴⁸ 11 A. and E. 54; 39 E. C. L. R.

⁴⁹ E. B. and C. 158; 96 E. C. L. R.

*himself.*⁵⁰ It is not the fact of invitation, nor of the knowledge of the probability of the customers presence which this implies which raises the duty, but the purpose of the visit and the occupier's interest therein. Mere volunteers, licensees, guests, and servants are expressly excluded, yet a guest may be invited expressly, not merely tacitly, and all save, perhaps, the volunteer are certainly to be expected to come on the premises. There is then in such case a duty to take care to make the place safe, not only to give notice of known defects, but to take care to discover any which may exist and then to remove either the defect, or else, by giving warning of its existence, to do away with the danger of injury from it.

*Burchell v. Hickisson*⁵¹ presents a striking instance of the difference between the position of one coming to premises on the occupier's business and a bare licensee. A little boy of four went with his sister to a lodging-house, she having business with a lodger. Some of the rails protecting a short flight of steps had fallen out and had been replaced by rope which had worn away and not been renewed. The boy fell through this gap and was injured. It was held that the defendant owed no duty to the boy save to take care that no concealed danger existed. "The sister went on business but the plaintiff did not—he was there as a companion, and his position can be placed no higher than that he was there lawfully and was not a trespasser. . . . The plaintiff was no doubt too young to see or guard against any danger, but the defendant never invited such a person as the plaintiff to come unless in charge of others; if he was in charge of others there was no danger."⁵²

⁵⁰ In *Smith v. St. Katherine's Docks*, L. R. 3, C. P. 326, cited in *Heaven v. Pender* in the Court of Queen's Bench, it was held that anyone who, having business with a vessel lying in defendant's docks, used a gangway furnished by the dock owners as a means of access thereto, went upon it with a view to business which concerned the dock owners. They were, therefore, liable for its improper condition, due to the careless manner in which it had been replaced by the dock owners' servants after its removal to allow another vessel to pass. The dock owners' business is to let dockage and access to vessels.

⁵¹ 50 L. J. Q. B. 101 (1880).

⁵² Two things appear to be indicated. 1st. That if a little child unaccompanied be invited or permitted to come on dangerous premises, it

There is in addition this difference between one who comes to a premises even on the owner's concerns, as a workman coming to make repairs, or a tradesman to deliver goods, and one to whom as a customer or client the place has been offered as the business place of the occupier. In the first case the visitor knows that he can expect no special preparation for his coming, therefore he is bound to be on the lookout for the dangers incidental to a place such as that to which he comes. On the contrary, a place held out as the business place of an occupier is usually and should always be prepared for the reception of the public; no customer need therefore be on the lookout for dangers. This, however, does not affect the principle involved, save in this, that in the first class of case many defects are to be looked for and are therefore patent to such care as should be taken by the visitor. In the latter, since the place has been prepared expressly for his reception, he need not be on so close a lookout to protect himself, and such dangers are not patent to any care he is bound to take.

So stood the cases when *Heaven v. Pender* came up for decision. The defendant, a dock owner, supplied a staging around a ship docked therein under a contract with the ship-owner. The plaintiff, a workman in the employ of a ship-painter who had contracted with the owner to paint the ship, went on the staging, which, on account of a defective rope, fell and the plaintiff was injured. The Court of Queen's Bench,⁵³ Field and Cave, JJ., held that since the defendant had parted with the dominion and control of the staging he could not be considered an occupier⁵⁴ within the meaning of the decision in *Indamaur v. Dames*, and

is the duty of the occupiers not merely to make the danger patent and open, but since an infant is known not to have the ability to appreciate the danger and so escape it, to make it safe, so that such permission or invitation may not lead the child into injury. 2d. This case suggests an explanation of the case of *Waite v. N. E. Railway*, E. B. and E. 728, without requiring the theory of identification between an infant in arms and its custodian.

⁵³ L. R. 9, Q. B. D. 306, in the Court of Appeals, 11 Q. B. D. 503.

⁵⁴ His position was considered analogous to a landlord's after a demise to a tenant; this being so, it would appear that in the opinion of the court the defect arose from a failure to repair a defect arising after this transfer of the staging.

so was not liable. The majority of the Court of Appeals, Cotton, L. J., Brown, L. J., concurring, held that there was no distinction between articles of which the control remains with the owner and those supplied for immediate use in the dock of which control is not retained. In each case the duty is to use reasonable care as to the state of the articles when delivered by him to the ship under repair for immediate use in relation to the repairs. To establish his liability, it must be proved that the defect existed at the time when the article was delivered."⁵⁵ While in this case the defendant had parted with the control temporarily, he was the owner and the article was furnished for use as an appurtenance to the dock.

Brett, M. R., after laying down his proposition that a duty of care arises wherever there is a probability of injury from a failure to exercise it, cites the cases of *Indamaur v. Dames* and *Smith v. London Docks* in its support. He says: "The phrase is used of invitation to the plaintiffs by the defendants. The real value of the phrase is that invitation imports knowledge of the probable use by the plaintiff of the article⁵⁶ supplied and therefore established the duty." He entirely overlooks the true ground of these decisions, the interest of the occupier in the visit of the person invited to come on the land for the occupier's purposes. Of all the cases which decide that no invitation, license, or other means of knowledge of the plaintiff's probable presence or use, if such use be for the plaintiff's purposes and not the defendant's, raises any affirmative or positive duty to take care, he cites only *Gautret v. Egerton*, which he says was decided because the declaration showed no reason to suppose that the licensee could not have seen the defects relied on. Now, in fact, the declaration alleged a duty to maintain in good repair and safe condition arising out of the fact of the license.

⁵⁵ There appeared to have been no evidence to show what was the condition when so handed over, nor how long they had been in use by the ship painter when the injury occurred, see facts stated, L. R. 9, Q. B. D. 306, nor that the dockowner had any knowledge of the defect, which was that a rope supporting the staging had been in some way scorched and weakened.

⁵⁶ Or premises.

The openness of the danger was alluded to as showing that there was no concealment of any latent defect known to the owner to conceal which would be "to wilfully deceive others," as Brett, M. R., says, the alternative duty is declared to be "not" to do *any act* which may place others in danger. The real point of the decision is that in the absence of *active misfeasance* there is no liability, there being no duty *to take precaution to protect* a mere licensee.⁵⁷ Had Brett, M. R., limited his proposition to acts negligently done,⁵⁸ and not included precautions carelessly omitted, the cases he cites would have supported him, but the principle would not have been applicable to the case he had in hand, since all that was alleged was a failure to inspect the ropes and repair before handing over the staging. *Corby v. Hill*, cited also, is an instance of active *wrong doing*, not of negligent omission, and therefore (as Brett, M. R., says) the form of declaration suggested by Willes, J., is exactly within the proposition that everyone must avoid actions probably injurious to others. *Gallagher v. Humphrey*⁵⁹ might also have been cited, supporting, as it does, his proposition thus limited. The case of *Heaven v. Pender* was considered and the principle adopted by the majority followed in *Elliott v. Hall*,⁶⁰ where the defendant was held liable for lack of care in not discovering, by inspection, the defective condition of property used for the purposes and in furtherance of his business, when he neither owned nor controlled the article at the time of the plaintiff's injury nor had he done any act which had in any way caused the defect. The defendant had leased defective coal trucks from a wagon company, and as colliery owner had loaded them with coal and without in-

⁵⁷ Willes, J., in course of argument: "It may be the duty to abstain from doing any act which may be dangerous to persons coming on the land by their permission or invitation. But what duty does the law impose upon these defendants to keep the bridges in repair? If I dedicate a road to the public full of ruts, they must take it as it is; if I dig a pit in it, I may be liable for the consequences, but if I do nothing, I am not."

⁵⁸ As he afterwards did in *Le Lievre v. Gould*, L. R. 1, Q. B. (93) 491.

⁵⁹ *Supra*, page 226.

⁶⁰ L. R. 15, Q. B. D. 315.

spection had forwarded them to a customer at whose yard and by whose servants they were unloaded. One of these was injured while so unloading the trucks by reason of their defective condition.

"If a vendor of goods forward them to a purchaser and for that purpose supply a truck and the goods are to be unloaded therefrom by the purchaser's servants, there is a duty to such servants to see that the trucks are in good condition and repair, so as not to be dangerous to them." Grove, J.

"The plaintiff is not merely one of the general public, a bare licensee, or a stranger. It was his duty to unload the truck. The defendant had sent the truck (in pursuance and execution of his contract with the purchaser) loaded with coal for the purpose of being unloaded by the buyer or his servants. This raises a duty to see that it was in a fit state."

A. L. Smith, J.

*Mulholland & Warwick v. Caledonian R. R.*⁶¹ marks the limit and extent of the liability of one supplying articles for the use of others. The defendants had shipped in their own trucks coals; the trucks, deliverable at their station at Dumfries, on arrival there were carried by another railway, the Glasgow and Southwestern Railway, to the consignee's premises by an arrangement to which the defendants were in no way party. The plaintiff was an employee of the second railway, and was during this journey injured by a defective condition of the trucks. It was held that the defendant was not liable, Lord Herschell saying, "For their own purpose and their own convenience the Glasgow Railway made an arrangement with the consignees to haul the coal to their premises. The Caledonian Company had performed all their obligations"⁶² (when they had carried the coals to the station and they had handed the wagons over). There

⁶¹ L. R. 98, A. C. 218.

⁶² Under their engagement to haul the coal. In *Moon v. R. R.*, 46 Minn. 106, where the defendant had furnished a car to a connecting line to be carried on towards a destination to which the defendant had contracted to convey it as through freight, since the defendant had an interest in the further conveyance, it being for the purpose of the execution of their contract, they were held bound to examine the car to see if it were fit for such use.

was no "duty on their part after they had fulfilled their contract of carriage to examine their wagons and see that the brakes were in fit condition for a subsequent journey in which for their (own) purpose the Glasgow Railway was going to haul them to the premises of the consignees. With that haulage the defendants had nothing to do, it was a new journey on an entirely different railway. Can they be liable to any workman of the Glasgow line who might be injured while the Glasgow company was using the wagon on what I may call their line and for their purposes because they were not when handed over in a condition fit for use⁶³ on that journey?" The staging in *Heaven v. Pender* was "supplied for purposes connected with the carrying on of the defendant's business. This wagon was being used on a new journey by the Glasgow company for their purposes and there was no trap created or permitted to exist by the defendant into which *they invited or permitted* the deceased to come."⁶⁴

These cases then establish certain definite principles:

1. An occupier of real property owes as to its condition no duty to a trespasser, not even to give warning of known and concealed danger.⁶⁵
2. To a licensee coming on the premises for his own purpose, whether by invitation or mere tacit permission, there is a duty only to disclose concealed dangers not known to the licensee.⁶⁶
3. To a person allowed or invited either specially or as one of the public to come on the premises for the purposes of the owner's business, there is a further duty to take care to discover any defect, not probably patent to such visitor,

⁶³ For the purposes of their business.

⁶⁴ It may, however, be said that such obligations are only imposed in so far as they are normally and generally necessary, that a special and extraordinary act, though it will protect a person or property from injury, will, if it be specially assumed, be regarded as contractual solely.

⁶⁵ His presence is not expected, there is no holding out of the property as fit to use, therefore no deceit, no leading into known danger, no actual active wrong.

⁶⁶ Else the invitation or permission being to use the premises as they appear to be is in itself a deceit, a leading into a known danger, an active wrong.

and to remove the defect or by notice to give the visitor an opportunity to avoid it.⁶⁷

There exists a general duty upon every man to refrain from acts, whether wilful or careless, probably injurious to others, who are expected to be within reach of their effects. Now, first, a trespasser need not be expected.⁶⁸ An occupier of land may act as he pleases without regard for merely possible and unlawful visitors; if, however, he shows that he does expect such a one and intends to injure him, as by setting traps or spring guns for him, he does become liable.

Second, as to a bare licensee, since he may lawfully come upon the land with the occupier's consent, his presence must be expected. No act may be done by such occupier or any other who knows of such license which may threaten injury to such licensee, and the act may be one creating an unpredictable and undiscoverable condition of the premises itself,⁶⁹ or it may be a use of them injurious to such lawful and expectable visitors.⁷⁰ Nor in regard to such active misfeasances is there any distinction between any and all licensees, whether by invitation express or tacit, for their own or the occupier's purposes, on business, the social guest, or the business customer. All are to be expected; no act may be done which threatens any of them.

Heaven v. Pender, *Elliott v. Hall*, and *Mulholland v. Caledonian Railway* deal with the obligations of one supplying chattels and not real estate for the use of others, but the same principles are applied: if the article is being used for the purposes of the defendant's business, he is bound to take precautions to have it safe for that use. In all of these cases the neglect was purely one of omission, a failure to take care to observe and remedy a defect, in *Elliot v. Hall* caused by others, in the others arising from some unexplained cause. No act of commission, whether wilfully or carelessly done, is alleged, nor anything equivalent to a conscious conceal-

⁶⁷ This last is a positive duty resting on the benefit to be derived by the occupier from the use of the land for his purposes.

⁶⁸ Save in highly exceptional cases.

⁶⁹ As in *Corby v. Hill*.

⁷⁰ As in *Humphry v. Gallagher*.

ment of a known defect. Returning to the opinion of Willes, J., in *Gautret v. Egerton*, since there was no actual wrong the cases must have been decided as they were because there was a breach of a positive duty: a duty arising out of a use in the defendant's business and for his purposes; a duty which, like all duties requiring affirmative action and not a mere abstention from injurious action, is at common law founded on a consideration. The burden is imposed only as the price of a benefit. No man need bear such a burden, but if he desire the benefit he must assume it. To sum up, the primary conception of the obligation in torts is to refrain from *injurious action*, unless the doing of the act, even with its attendant risk, is so beneficial to the public generally, the object of it so valuable to the general welfare, that even private injury must be borne to encourage it, the obligation and attendant liability extend to all who may be foreseen as within the radius of its effects. But the conception of a duty of protection owed to another against the consequences of his own actions is foreign to the law of torts.

Such duties rest upon an assumption of them either by express consent or as inevitable legal incidents to certain actions, businesses, or uses of property. Such assumption can rest only on consideration. An express promise is void if gratuitous; no affirmative duty will be imposed without a corresponding benefit.

Such obligations arise only when assumed, but they are not the creatures wholly of consent, they may be annexed to the performance of certain acts, the conduct of certain businesses, the use of property in certain ways; the performance of these acts, the entering into such business, and the use of the property is wholly voluntary, but if done the duties follow as a matter resting wholly on the policy of law, that policy which protects the right of citizens from positive injury. Such duties therefore only arise when they are necessary to protect others from the consequences of acts, businesses, or uses of property beneficial to those who do them, engage in them, and use it. All affirmative duties may truly be termed assumptional and founded upon consideration, whether to protect from injury or to confer a benefit. All

were, as has been seen, originally enforced by action in the case on the assumpsit. Damage being the basis of such action, the actual loss of a legal right had to be shown. Save in exceptional pursuits, where service must be rendered to all alike, as carriers, innkeepers, etc., there was no legal right to such benefit.⁷¹ Nor did the early common law recognize any interest in the public that an expected benefit should be conferred. So in such case to show damage the loss of the consideration had to be shown. Only he who had paid it could lose it, so only he who was a party to the consideration could maintain the action. Such purely beneficial assumption, expressly assumed, came, too, probably by analogy to the action of covenant, the pre-existing remedy for similar obligations formally assumed, to be regarded as grants of the expected benefit. So the measure of damages was held to be the loss of the benefit to be derived from performance and not the value of the consideration paid. Such a grant, like that in a formal covenant, would be naturally held to extend only to the grantee and depend in its extent on the will and consent of the grantor. Such obligations thus came to be regarded as resting wholly on the consent of the parties who had undertaken them and limited to those to whom they were assumed and enforceable only by parties to the consideration. Such are the essential elements of purely contractual duties which separate and distinguish them into a distinct class of assumptional obligations. The natural tendency to overwork a new discovery led the courts to treat as contractual even those assumptional duties which were imposed by the policy of law towards those who had in fact furnished the consideration on which they were founded. It is very usual for courts to speak of such duties as are inevitably imposed for protection from injury as incidents to the conduct of a business as resting upon an implied term in contracts made in their exercise.⁷²

⁷¹ In such exceptional cases an action on the case in tort to-day lies for the loss of the benefit of the performance of such duties.

⁷² It is highly doubtful whether even an express consent to perform a duty imposed by law can add anything to the existing obligation. Such an obligation should remain fundamentally one founded on public

This tendency has led to the unfortunate idea that when there is a contract between two persons, no one can be concerned with anything done in performance or breach thereof save the parties thereto, and that any action brought to recover even for an actual injury⁷³ by one not a party thereto is an attempt to sue on the contract. However, notwithstanding the tendency of contract to usurp the place of tort even to-day, it will be found that *acts* probably injurious are regarded as solely tortious only; a failure to perform a duty voluntarily assumed, whereby a benefit is lost, is wholly a breach of contract. A failure to perform an obligation to avoid injury assumed as the price of action is regarded as either at the election of the party injured if he be a party to the consideration, as a tort solely if he be not.⁷⁴

NOTE.

The cases which have been discussed are in no way exceptional, nor are they governed by rules peculiar to themselves. They are merely applications of a principle general to the whole subject of affirmative obligations. Such obligations are throughout the common law based on consideration; a benefit to him on whom they are imposed—both in tort and contract: the latter being peculiar in this, that for procedural reasons they are only enforceable by a party to the consideration.

Many instances of the application of this principle to the law of torts might be cited. In *Hearns v. Waterbury Hospital*, 66 Conn. 98, Hammersly, J., distinguishes on this ground the immunity of a charitable corporation for the acts of its servants done in the furtherance of its public and charitable purposes from the ordinary liability of a master for his ser-

policy, and whatever the form of action, the measure of redress should remain that appropriate to those actions given to enforce public duties—actions of tort. It is certain that such imposed duties cannot be limited by consent beyond the point of sufficient protection of those for whose safety the duty was imposed, as where a carrier endeavors to limit his liability for negligence, nor can an express rejection and exemption of such a duty, even within these limits, avail against any save a party to the contract, as in *Seybold v. R. R.*, 95 N. Y. 562.

⁷³ As distinguished from a mere failure to obtain the benefit of the performance.

⁷⁴ It may, however, be said that since such obligations are only imposed so far as they are normally necessary, a special and extraordinary act, though it will afford extraordinary protection to person or property, will, if it be speedily assumed, be regarded as solely contractual.

vant's acts. "The corporation," he says, "derives no benefit from what the servant does—in the sense of that personal and private gain which is the real reason of the rule"—i.e., of *respondeat superior*. "The master is ordinarily liable," he says, "because he sets the servant to work to prosecute his private ends with the expectation of deriving from that work private benefit."¹ "The patient is not a stranger to the transaction—he is rather a participant. The thing about which the servants are employed is the healing of the sick. This is set in motion not for the benefit of the defendant, but of the public."² See also *McDonald v. Hospital*, 120 Mass. 432. In *Hill v. Boston*, 122 Mass. 344, this principle is applied to determine the liability of municipal corporations for non-performance of affirmative duties imposed by general statutes. Gray, J., says, "No private action can be maintained for the neglect of a public duty imposed upon it (such a corporation) by law for the benefit of the public from the performance of which the corporation receives no profit or advantage." He points out that the Massachusetts town was a well-recognized corporation with full powers long before the constitution of 1820 authorized the legislature to "erect or constitute city governments" when towns had attained a certain size. This language shows, he says, that "such is to be done for the convenient administration of local government and not for the purpose of conferring any peculiar benefit on the municipality or its inhabitants." Thus there is not, as where a charter creates a new corporation with new powers and correlative duties, any grant of new powers the acceptance of which is the consideration for the imposition of new duties. He gives certain instances of admitted municipal liability:

1st. For certain acts of misfeasance: active wrong-doing and not mere non-performance of an affirmative duty.

2d. For the repair of sewers constructed under certain acts founded on the acceptance of the benefit of the act, which were not applicable until accepted, and upon the fact that when the act was accepted and the sewers were built the property therein vested in the city while the cost was borne by the land benefited.

¹ In *Hale v. Smith*, 2 Bingham, 158, Best, C. J., expresses much the same thought. He says: "The maxim of *respondeat superior* is bottomed on the principle that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it."

² It is possible that the master's exemption from liability to his servant for the acts of a fellow-servant is based upon a modification of this thought. The work on which the fellow-servant is engaged is for the joint benefit of both master and servant—the master obtaining his profits, the servant employment and wages therefor.

3d. "When the corporation holds and deals with property not for the use of the public, but for its own benefit, as by receiving rent." "The distinction between acts done by a city in discharge of its public duty and acts done for its private advantage has been pointed out by Nelson, C. J.,³ Strong, J.,⁴ and Cockburn, C. J."⁵

4th. When it obtains at its own request exceptional powers by its special charter. There "the duty is imposed in consideration of the benefit received by the corporation."⁶

In *Robbins v. Jones*, 15 C. B. N. S. 221, the opinion prepared by Willis, J., and delivered by Erle, C. J., contains an emphatic declaration that the duty of repair of a highway or structure therein is upon those who derive the benefit from its existence. "A bridge made by a private individual at an antient ford, if useful to the public, is to be repaired by them" (page 240). "The flagging and grating was not used or worn out by the owner of the houses otherwise than as one of the public" (page 241)—it is not the quantum of use, but whether the use be for a private purpose or in the exercise of a public right which determined his duty to repair. A ruinous cellar door is different, "it is worn out by use for the benefit of the occupier of the cellar to which it is the door." So too "where an easement is granted—the grantee and not the grantor is to maintain and repair the subject of the easement." The whole opinion shows how basic of the affirmative obligation of repair is benefit from the use of the thing in question.⁷

Francis H. Bohlen.

³ *Bailey v. N. Y.*, 3 Hill, 539.

⁴ *Saving Fund v. Philadelphia*, 31 Pa. 189.

⁵ *Scott v. Manchester*, 2 H. and N. 210.

⁶ See also *Davis v. Plank Road*, 27 Vt. 602; *Improvement Co. v. Rhoads*, 383, and contrasted to the latter case, *Painter v. Pittsburgh*, 46 Pa. 213.

⁷ Many further instances might be given to the same effect if space permitted.

(To be continued.)